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In The
Supreme Court of the United States
October Term, 1982

STATE OF NEW MEXICO and HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

vs.

MESCALERO APACHE TRIBE,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether federal law, examined in light of broad underlying federal policies and the traditional right of tribal self-government, has preempted state regulation of wildlife resources within the Mescalero Apache Reservation.

2. Whether state regulation of wildlife resources within the Mescalero Apache Reservation constitutes an impermissible interference with the right of the Mescalero Apache Tribe to self-government and territorial management.

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STATEMENT OF THE CASE

A. Statement of Facts

This case was presented to the United States District Court of New Mexico largely on a stipulation of facts by the parties, set forth in Respondent's Appendix at 1a-41a.[1] Two hearings were held at which the district court received testimony on matters of fact.

The Mescalero Apache Tribe is a federally recognized Indian tribe governed by its Constitution of January 12, 1965, which was adopted pursuant to the Indian Reorganization Act, 25 U. S. C. Sec. 476 (Res. App. at 2a).

The Tribe signed a Treaty with the United States on July 1, 1852, which submitted the Tribe and its members exclusively to the laws, jurisdiction, and government of the United States of America (*id.* at 4a). Article 9 of the Treaty provided that the United States government would, at its earliest convenience, designate, settle, and adjust the boundaries of the Mescalero Apache lands (*id*). The Reservation of the Mescalero Apache Tribe was confirmed by a Presidential Order in 1873, and was established as it presently exists by an Executive Order dated March 24, 1883. The Reservation is located entirely in the aboriginal territory of the Mescalero Apache Tribe in the State of New Mexico (Res. App. at 2a-6a; Pet. App. at 39a). The Mescalero Apache Reservation contains 460,000 acres belonging to the Tribe, but only 180-185 acres that are held in fee by non-Indians (Pet. App. at 6a).

The federally-approved Constitution of the Mescalero Apache Tribe provides that the control of reservation lands shall be in the Tribal Council and further provides that the Tribal Council shall have the power and duty "to protect and preserve the property, wildlife and natural resources of the tribe" (Jt. App. at 45a, 52a-53a). The Constitution also provides that any ordinance directly af-

[1] "Res. App." refers to the appendix in The Opposition to Petition For a Writ of Certiorari; "Pet. App." refers to the Appendix in the Petition for Writ of Certiorari; "Jt. App." refers to the Joint Appendix herein.

fecting non-members of the Tribe shall be subject to review by the Secretary of the Interior (*id.* at 53a).

Over the past several years, the Mescalero Apache Tribe has developed an extensive tourism program designed to bring income and employment to the Reservation (Pet. App. at 39a). As a part of that program and in order to better manage and control its wildlife resources, the Tribe, pursuant to its Constitution, has developed a comprehensive scheme regulating all aspects of hunting and fishing on the Reservation (*id.*). The Tribal Council has adopted hunting and fishing ordinances requiring tribal licenses for all hunters and anglers, setting bag limits, and establishing programs and seasons for hunting and fishing on the Reservation, all duly approved by the Secretary of the Interior (*id.*). Game tags are issued with each tribal license, and are required to be attached to game taken on the Reservation (Res. App. at 11a). Tribal regulations are enforced through citations by tribal officers to tribal courts or to federal courts pursuant to 18 U. S. C. Sec. 1165 (Jt. App. at 165a).

The revenue derived directly and indirectly from hunting and fishing on the Reservation constitutes a significant economic benefit to the Tribe, and provides tribal members a wide range of governmental and social services (Pet. App. at 11a, 39a). In recent years, direct tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods tourist complex, and campground and picnic permits has exceeded $250,000.00 per year (*id.* at 11a n. 4). Additional indirect revenue is generated through the tourism program (*id.* at 9a). The tribal hunting and fishing program also provides employment opportunities to a substantial number of tribal members (Res. App. at 6a-10a).

Hunting and fishing by nonmembers on the Mescalero Apache Reservation comprises, however, only a miniscule portion of total hunting and fishing in the State of New Mexico (Pet. App. at 11a-12a). The relative size of the tribal operation is indicated by the number of licenses

sold in comparison to the number sold in the state as a whole. In a recent year, 50 elk licenses were sold, compared to 14,000 by the State; ten tribal antelope licenses were available, compared to 3,500 for the State; and 500 tribal deer licenses were available, compared to 100,000 for the State (*id.* at 12a n. 5). The State Director of the Fish and Game Department testified that the total number of hunters on the Reservation was "insignificant" (Jt. App. at 211a). The tribe has restricted the number of hunting opportunities to a level consistent with good conservation practices by turning down applications for big game licenses and package hunts (Res. App. at 36a). The vast majority of the non-Indian hunters and anglers on the Reservation are non-residents of the State of New Mexico (Res. App. at 39a).

The Mescalero Apache Tribe conducts a complete fish and game management program exclusive of the State of New Mexico (Pet. App. at 41a). The Tribe employs seven full-time conservation officers who assist a Bureau of Indian Affairs range conservationist with game management, aerial surveys, and pellet group transect studies to determine the deer, elk, antelope and bear populations on the Reservation (Pet. App. at 39a-40a). The results of these studies are submitted to the Tribal Council for its consideration in setting bag limits and seasons (Jt. App. at 25a).

Much of the reservation wildlife is effectively a creation of the Tribe and Federal Government (Pet. App. at 12a). Prior to 1966, elk population in the vicinity of the the Reservation was estimated at 13. In 1966-1967, the National Park Service donated an elk herd to be released on the Mescalero Apache Reservation (*id.* at 40a). The Tribe performed considerable range development in order to remove cattle from direct competition with the elk herd, and the elk population is now estimated at 1200 (*id.*). The Reservation has sufficient food, water and variety of elevation to support elk year round. The elk are migratory and therefore provide increased hunting opportunities for

non-members outside the Reservation (*id.* at 12a, 40a). The antelope poulation on the Reservation is non-migratory (Pet. App. at 12a).

The Reservation has no natural lakes (*id.* at 40a). Several man-made lakes have been constructed over the years with federal funds, some of which also have picnic and camping facilities constructed by the Tribe (Res. App. at 13a). The State of New Mexico has never stocked any lake within the Mescalero Apache Reservation. Since 1976, the State has not stocked any streams (*id.* at 14a). From 1970 until 1976, the State stocked only part of one stream on the Reservation (*id.*). The Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, operates a National Fish Hatchery on the Reservation, and provides technical assistance in the management and development of fishery resources in Reservation waters (Pet. App. at 40a). A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation (Res. App. at 14a). All waters within the Reservation are stocked exclusively with fish from the National Fish Hatchery at Mescalero (Res. App. at 41a).[2]

Within the boundaries of the Mescalero Apache Reservation, the State of New Mexico, in the last twelve years, has not selected or improved any land or water areas as adaptable for wildlife feeding, resting or breeding places (Pet. App. at 40a-41a). The State has neither adopted nor formulated any plans for restocking lakes and streams with fish, has not conducted research into problems of fish management or administration of fish resources, and has under taken no wildlife restoration projects (*id.*). The State receives federal matching funds through the Pittman-Robertson Act, 16 U.S.C. Sec. 669, and the Dingle-Johnson Act, 16 U.S.C. Sec. 777, for hunting and fishing on the Mes-

[2]The National Fish Hatchery has continued to be operated by the Fish and Wildlife Service with federal funding from the United States Department of the Interior.

calero Reservation, but no evidence was presented that such funds have ever been directly expended on the Mescalero Apache Reservation (Res. App. at 17a-18a). The State has played no significant part in the creation and preservation of reservation wildlife resources (Pet. App. at 12a). The State makes no claim that any species is endangered, and agrees that tribal management of reservation wildlife resources has been in conformance with accepted wildlife management procedures (Res. App. at 32a-33a).

Direct conflicts exist between state and tribal regulations governing hunting and fishing. For example, a tribal ordinance specifically states that no state license shall be necessary for any person hunting or fishing on the Reservation (Pet. App. at 41a). There are many other areas of conflict. Tribal seasons and bag limits for both hunting and fishing rarely, if ever, coincide with those of the State (Pet. App. at 41a). This causes annual conflict between the Tribe and the State, and interferes with the ability of the Tribe to schedule its hunts according to the results of tribal conservation studies and the availability of tribal personnel to monitor the hunts (Jt. App. at 153a-157a). State law prohibits the killing of does, while the Tribe permits a hunter to kill both a buck and a doe, in order to maintain the proper ratio of bucks to does and to prevent deer overpopulation on the Reservation (Jt. App. 153a-154a). State law prohibits a person from hunting elk or antelope in two consecutive years, while tribal law does not (Res. App. at 26a). In the past this conflict has led to the arrest of non-Indian hunters on the Reservation (*id.* at 34a). State law requires juvenile hunters to obtain a Hunter Safety Certificate, while tribal regulations do not (Res. App. at 32a).

Despite its lack of involvement in the protection of wildlife resources on the Reservation, the State has been actively prosecuting non-Indians for violation of New Mexico hunting and fishing laws through acts committed within Reservation limits that were not violations of tribal laws (Pet. App. at 41a).

B. Procedural History

This lawsuit was initiated when the Tribe applied for a temporary restraining order to prevent the State from arresting non-Indian hunters for hunting on the Reservation during one of the Tribe's big game seasons, which began prior to the State's season. On July 7, 1977, the Tribe filed an action for declaratory and injunctive relief, challenging the State's attempt to regulate the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache Reservation. The court enjoined the State from enforcing its game laws against any person for acts done on the Reservation. The court held that "the fish and game ordinances and regulations of the Mescalero Apache Tribe, therefore, authorized and sanctioned by the federal government and accompanied by active federal support of the fish and game program on the Mescalero Reservation, provide the integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation" (Pet. App. at 51a-52a).

The Court of Appeals for the Tenth Circuit affirmed the decision of the district court. The court found that the traditional sovereign powers of the Tribe in wildlife management, affirmed and protected by federal treaty, statutory schemes, policies and participation, compelled the conclusion that federal law has preempted the exercise of state power. The Tenth Circuit further found, as an independent ground for its decision, that the exercise of state power would constitute an impermissible interference with tribal self-government.

The State then filed a petition for writ of certiorari in this Court. This Court granted the petition and remanded the case for further consideration in light of the decision in *Montana v. United States,* 450 U. S. 544 (1981). While the Tenth Circuit was reconsidering its decision, this Court decided *Merrion v. Jicarilla Apache Tribe,* 455 U. S. 130 (1982), in which this Court affirmed the broad power of Indian tribes to control and regulate tribal resources on

tribal lands. The Tenth Circuit then reinstated its previous decision, holding that the involvement of tribal trust land distinguished this case from *Montana* and required application of the principles set forth in *Merrion*. The State's second petition for writ of certiorari was granted on November 15, 1982.

SUMMARY OF ARGUMENT

1. The State of New Mexico has presented to this Court a claim of authority to control the management and harvesting of wildlife resources on the Mescalero Apache Reservation. This claim of broad regulatory authority over tribal trust lands is not based on any federal statute, and is therefore without precedent before this Court. The authority to control resources on tribal land is a fundamental attribute of tribal sovereignty, recently reaffirmed in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982). This aspect of tribal sovereignty has not been divested by express congressional action or by necessary implication of the Tribe's dependent status. The federal government and the Mescalero Apache Tribe have comprehensively regulated the management and harvesting of wildlife resources on the Reservation. The State's attempt to superimpose its system of regulation is barred by the doctrine of federal preemption.

This Court has recently restated the broad outlines of the premption analysis. *Ramah Navajo School Board v. Bureau of Revenue,* — U.S. —, 102 S.Ct. 3394 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). The application of the doctrine of federal preemption requires a particularized examination of the relevant state, federal and tribal interests. The "guiding principle" of this analysis is that the determination of preemption must be informed by the traditional notions of tribal sovereignty and by federal recognition and encouragement of sovereignty through promotion of tribal independence and economic development.

The interests of the Tribe and the federal government overwhelmingly transcend the minimal interest asserted by the State. The issue in this case is whether the State can regulate wildlife resources on tribal trust land. The Tribe and the federal government have effectively created the wildlife resource on the Reservation, through importation of an elk herd, establishment of a fish hatchery, stocking of streams, construction of lakes for fishing, comprehensive range management, and general conservation activties. With the approval and assistance of the federal government, the Tribe has enacted and enforced comprehensive regulations covering all aspects of hunting and fishing on the Reservation. The tribal hunting and fishing program is an integral part of the Tribe's tourism program, and is an important source of revenue for tribal government and employment for tribal members.

The State has played no part in the development of the wildlife resources, and has expended no funds on the Reservation in recent years. The tribal and federal management of reservation wildlife resources has been exemplary and the State concedes that there has been no adverse impact off the Reservation. Imposition of state regulation would nullify much of the tribal scheme. The hunting and fishing on the Reservation is an insignificant portion of the state-wide total, so the State's revenue interest is minimal.

The federal government has acted to completely preempt state regulatory jurisdiction through the applicable treaty and federal statutes, federal approval of the tribal Constitution and ordinances, and federal participation in the development and management of the resource. Viewed in light of the traditions of tribal sovereignty and federal policy encouraging self-determination, the federal government has clearly indicated its intent to establish reservation wildlife resources as within the exclusive sovereignty of the Mescalero Apache Tribe under general federal supervision and to preclude the application of state law.

2. State regulation of reservation wildlife resources impermissibly interferes with the Mescalero Apache Tribe's inherent right of self-government and territorial management. Regulation of reservation resources is a fundamental aspect of tribal sovereignty. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982). Tribal sovereignty is subordinate to only the federal government. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 153 (1980). Where the Tribe, as sovereign, has a significant interest, not subject to an overriding federal interest, in an activity occurring on tribal lands, its sovereign authority is exclusive.

Dual systems of regulation necessarily create mutual dislocation. If the State is allowed to exercise general regulatory authority over the management and harvesting of reservation wildlife resources, the sovereign power of the Tribe will be meaningless. The Tribe will be powerless to effectively manage reservation fish and game for conservation purposes and for tribal benefit. This Court has recognized that broad state regulatory power over tribal lands could destroy existing tribal governments, and has refused to find such state power in the absence of congressional authorization. *Bryan v. Itasca County*, 426 U. S. 373 (1976).

The State is attempting to regulate a value generated on the Reservation through tribal and federal efforts. Hunters and anglers receive extensive tribal services. The State's interest is minimal or non-existent. Federal policy encourages and protects tribal economic development and management of tribal resources. Only the Tribe can comprehensively regulate all hunting and fishing on the Reservation. The exemplary tribal resource management scheme may be adequately enforced by existing means. Under these circumstances, state regulation is a drastic and totally unwarranted interference with the inherent sovereignty of the Mescalero Apache Tribe and the federal commitment to tribal self-determination.

ARGUMENT

I. Federal Law, Examined In Light Of Broad Underlying Federal Policies And The Traditional Right Of Tribal Self-Government, Has Completely Preempted State Regulation Of Wildlife Resources Within The Mescalero Apache Reservation.

A. The Doctrine of Federal Preemption

The constitutional source of federal power over Indian affairs is the Indian Commerce Clause, U. S. Const., art. I, sec. 8, cl. 3, which states that "[t]he Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes. . ." This provision places Indian tribes under the plenary authority of the federal government, but the tribes retain all attributes of inherent sovereignty not expressly divested by federal law or necessarily inconsistent with their dependent relation to the federal government. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 154 (1980). State actions which conflict with these principles of federal law are invalid under the Supremacy Clause, U. S. Const. art. VI, cl. 2.

The two complementary principles of broad federal power and tribal sovereignty have erected two separate but related barriers to the exercise of state authority over reservation activities: state authority may be preempted by federal law or it may interfere with tribal exercise of sovereign functions. These jurisdictional analyses must be applied with reference to two longstanding canons of construction. The first requires that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U. S. 373, 392 (1976). Second, all treaties and statutes must be viewed against the underlying federal policy of leaving Indians free from state jurisdiction and control. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 168 (1973).

The modern doctrine of federal preemption was first clearly identified in *Warren Trading Post Co. v. Arizona*

Tax Commission, 380 U. S. 685 (1965). Arizona had levied a tax on the gross income of a federally-licensed retail trading business on the Navajo Reservation. This Court found that the comprehensive federal scheme for regulation of Indian traders, together with the congressional policy of leaving the Indians "free to run the Reservation and its affairs without state control", and federal assistance in fulfillment of treaty obligations, had completely preempted state jurisdiction. This Court stated that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Id.* at 691.

Since *Warren Trading Post*, this Court has confirmed the broad scope of the preemption analysis. In *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), this Court examined Arizona's attempt to impose its personal income tax on a reservation Indian whose entire income derived from reservation sources. Noting that the trend was toward reliance on federal preemption as a bar to state jurisdiction, this Court found that the applicable treaties and statutes, viewed against the important backdrop of Indian sovereignty, precluded state jurisdiction. This Court cautioned that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *Id.* at 172.

In *McClanahan*, this Court rejected the State's argument that the *Warren Trading Post* holding was restricted to cases involving actual federal regulations inconsistent with state law, and set forth an expanded version of the preemption doctrine:

> The court below distinguished *Warren Trading Post* as limited to cases where the Federal Government has pre-empted state law by regulating Indian traders in a manner inconsistent with state taxation [citations omitted]. But although the Court was, no

> doubt, influenced by the federal licensing requirements, the reasoning of *Warren Trading Post* cannot be so restricted. The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.

McClanahan, 411 U.S. at 170, n. 6 (1973). Under the *McClanahan* analysis, federal preemption does not require actual conflict with a specific federal enactment, but applies to any matters "within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *Id.* at 179-80.

Although there is still no "definitive formula" for resolving the question whether a state may exercise jurisdiction over reservation activities, this Court has recently restated the broad outlines of both the preemption analysis and the infringement test. In *Ramah Navajo School Board v. Bureau of Revenue*, — U.S. —, 102 S. Ct. 3394 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), states attempted to impose taxes on commercial activity on Indian reservations. In both cases, this Court found that state authority over non-Indian activity on the Reservation had been preempted by federal law, and provided a clear identification of the interests to be considered in the preemption analysis.

In *White Mountain*, this Court found that Arizona's application of motor carrier license and use fuel taxes to a non-Indian logging company had been preempted by federal law. The Court found that the federal regulatory program and federal policy guaranteeing Indians the benefit from the natural resources on their reservation would be threatened by imposition of the state tax. *Id.* at 136, 149. The Court found that "state authority over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject." *Id.* at 151.

In *Ramah Navajo School Board v. Bureau of Revenue*, 102 S. Ct. 3394 (1982), this Court considered New Mexico's attempt to impose its gross receipts tax on a non-Indian construction company's receipts from construction of a school for Indian children on the Reservation. This Court stated that the preemption inquiry is not dependent on mechanical conceptions of state or tribal sovereignty, but calls for "a particularized inquiry into the relevant state, federal and tribal interests," an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *Id.*, 102 S. Ct. at 3399. This examination is not controlled by standards of preemption developed in other areas, but is informed by the traditional notions of tribal sovereignty and by federal recognition and encouragement of sovereignty through promotion of tribal independence and economic development. *Id.* Recognition of Indian sovereignty and tribal independence in the preemption analysis is essential in order to reconcile the emphasis on the pervasiveness of federal regulation with the federal policy of encouraging Indian self-determination. *Id.*, 102 S. Ct. at 3403. The flexibility of this approach was found to provide sufficient guidance to state courts in regard to on-reservation activities, so long as the courts construe federal statutes and regulations generously "in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Id.* (quoting *White Mountain*, 448 U. S. at 144.) A particularized examination of the interests involved here demonstrates federal preemption of state regulation.

B. A Particularized Examination Of All Relevant Interests Compels A Finding That State Jurisdiction Has Been Preempted By Federal Law.

1. Tribal And Federal Interests Are Great While The State Has No Significant Interest In The Regulation Of Reservation Wildlife Resources.

Tribal access to and control of wildlife resources are among the most important of the rights reserved by Indian tribes. This Court has characterized tribal fishing rights as fundamental:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

United States v. Winans, 198 U. S. 371, 381 (1905).

As a basic proposition it is clear that Indians traditionally enjoyed the exclusive right to hunt and fish on lands reserved to them. *Menominee Tribe v. United States*, 391 U. S. 404 (1968). Since the Treaty of July 1, 1852 was "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," the Tribe reserved its right to exclusive control of hunting and fishing on its lands, although the Treaty does not specifically mention the right. *United States v. Winans*, 198 U. S. 371, 381 (1905); *Menominee Tribe v. United States*, 391 U. S. 404 (1968). The Tribe's sovereign powers are not affected by the subsequent designation of boundaries through Executive Order. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130, 133-34 n. 1 (1982).

Tribal hunting and fishing rights are a part of established tribal rights to full use and enjoyment of the reservation and the fruits of the land, and entitlement to sufficient resources to make the reservation capable of producing a moderate standard of living. *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658 (1979); *Arizona v. California*, 373 U. S. 546 (1963); *Shoshone Tribe v. United States*, 299 U. S. 476 (1937).[3] This Court has repeatedly

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[3]Congress has compensated Indians for the loss of valuable hunting and fishing rights. *See* 13 Stat. 324 (1864) ($5,000 compensation for off-reservation hunting and fishing rights); *Whitefoot v. United States*, 293 F. 2d 658, 660 (Ct. Cl. 1961), *cert. denied*, 369 U. S. 818 (1962) ($15,000.00 for loss of fishing

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extended protection to these rights down to the present day. *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658 (1979); *Antoine v. Washington*, 420 U. S. 194 (1975).

Contrary to the State's assertions, tribal control over wildlife resources on tribal land has been the traditional assumption. In his authoritative text on Indian law, Felix Cohen cited approvingly a number of cases and Interior Department opinions holding that state regulation of reservation fishing rights was contrary to law. F. Cohen, *Handbook of Federal Indian Law* 285 (1942). *See State v. Johnson*, 212 Wis. 301, 249 N. W. 285, 288 (1933) (state game and fish laws not applicable to trust lands); *I Op. Sol. I. D.* 652 (M 28107, June 30, 1936) (wildlife resources on tribal land not subject to state regulation); *I Op. Sol. I. D.* 202 (M 24358, May 14, 1928) (state could not regulate boating or fishing on tribal lands).[4] Congress has provided criminal sanctions for hunting and fishing on Indian lands without tribal permission. 18 U. S. C. 1165. And, in enacting Public Law 280, 67 Stat. 590 (1953), Congress specifically protected the tribes from deprivation of rights with respect to "hunting, trapping or fishing, or the control, licensing or regulating thereof." 25 U. S. C. Sec. 1321 (b).

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privileges caused by dam construction). This Court has recognized that hunting and fishing rights are a compensable interest under the Fifth Amendment. *Menominee Tribe v. United States*, 391 U. S. 404 (1968).

[4]In addition to the opinions cited by Cohen, *see also* I Op. Sol. I. D. 702 (M 28568, December 11, 1936) (state may not enter reservation to enforce state game law); I Op. Sol. I. D. 975 (M 30920, September 4, 1940) (application of state game laws forbidden as interference with interests of the tribe and federal government); II Op. Sol. I. D. 1185 (M 31480, February 12, 1943) (power of tribe to regulate non-Indian hunting and fishing is "undoubted" and exclusive on non-ceded tribal lands); II Op. Sol. I. D. 2062, 2069-70 (June 3, 1974) (state regulation of boating and fishing invalid if in conflict with tribal regulation). An opinion to the contrary, cited by Petitioners, has been withdrawn (Pet. Br. at 21 n. 10).

Petitioners' claim that state authority has been "uniformly recognized" is a blatant misstatement. Pet. Br. at 21. Traditionally, little non-Indian fishing and hunting occurred on tribal lands. The issue, therefore, was usually whether the state could regulate Indian fishing and hunting, and state jurisdiction was uniformly denied. *See, e. g., United States v. Hamilton*, 233 F. 685 (W. D. N. Y. 1915); *In re Linco'n*, 129 F. 247 (N. D. Cal. 1904); *In re Blackbird*, 109 F. 139 (W. D. Wis. 1901).

Recent decisions continue to recognize tribal authority over reservation wildlife resources. In *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n*, 588 F. 2d 75 (4th Cir. 1978), the federal government and the Tribe had created an integrated scheme for the development of reservation fishing. The Fourth Circuit found that the State could not require a license for on-reservation fishing because the Tribe and the federal government had preempted the field and state licensing would infringe upon the tribal right of self-government. In *White Mountain Apache Tribe v. State of Arizona*, 649 F. 2d 1274 (9th Cir. 1981), the court affirmed the grant to the Colville Tribes of a preliminary injunction preventing the exercise of state authority over non-Indian fishing on the Reservation, and remanded to the District Court a similar claim on behalf of the White Mountain Apache Tribe, for consideration of the relevant federal, tribal and state interests. Where the Tribe has accommodated itself to state regulation, however, no preemption or infringement has been found. *United States v. Montana*, 604 F. 2d 1162 (9th Cir. 1979), *rev'd on other grounds*, 450 U. S. 544 (1981); *United States v. Sanford*, 547 F. 2d 1085 (9th Cir. 1976).[5]

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[5]Where courts have found dual state regulations permissible, the inherent conflict has sometimes led to absurdly inconsistent results. *See, e. g., California v. Quechan Tribe*, 424 F. Supp. 969 (S. D. Cal. 1977), *rev'd on other grounds*, 595 F. 2d 1153 (9th Cir. 1979) (state had limited right to regulate, but no

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Tribal regulatory jurisdiction derives from the Tribe's general authority, as sovereign, to control activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in activities within that jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130, 137 (1981). Tribes retain the inherent power necessary to tribal self-government and territorial management. *Id.* at 141. Tribal regulatory jurisdiction is a part of the "broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. . . ." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 152-153 (1980). Tribal regulatory jurisdiction over non-Indian hunting and fishing on reservation lands has been recognized by the Court and conceded by the State. *Montana v. United States*, 450 U. S. 544, 557 (1981). Pet. Br. at 39, 42.

The decision of the Tenth Circuit is entirely consistent with the scope of tribal sovereignty established by this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978) and *United States v. Wheeler*, 435 U. S. 313 (1978). Those cases do not establish an unqualified general proposition that tribal sovereign powers do not extend to nonmembers. In *Oliphant*, this Court ruled only that Indian tribes could not exercise criminal jurisdiction over non-Indians, as a necessary implication of their dependent status on the federal government. In *Wheeler*, this Court held that tribal power to punish tribal offenders is an aspect of retained sovereignty, and reiterated that "until Congress acts, the tribes retain their existing sovereign powers." 435 U. S. at 323.

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right of enforcement on the Reservation), *Donahue v. California Justice Court for Klamath Trinity Judicial District*, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (Ct. App. 1971) (state had regulatory jurisdiction over fish and game, but tribal permission was a complete defense to charge of violation of state law).

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980), this Court upheld tribal power to tax non-tribal members. This Court sharply distinguished the case from *Oliphant*, noting that tribal authority over activities taking place "on Indian lands, in cases where the Tribe has a significant interest in the subject matter, was very probably one of the tribal powers under 'existing law' confirmed by Sec. 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U. S. C. Sec. 476." *Id.* at 153. This Court restated an enduring principle of federal Indian law: "Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . ." *Id.* (citing *Wheeler* and *Oliphant*). Thus, unless the State can show that the regulatory power of the Mescalero Apache Tribe is inconsistent with an overriding federal interest, the inherent power is retained. The fact that the tribal exercise of power conflicts with state power will not cause a divestiture. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville*, 447 U. S. at 154. *See also Confederated Salish and Kootenai Tribes v. Namen*, 665 F. 2d 951, 962-65 (9th Cir. 1982) (tribes retained inherent power to regulate non-Indian use of riparian tribal trust land). In *Montana*, this Court affirmed that tribes retain the powers necessary either to protect tribal self-government or to control internal relations, including some forms of civil jurisdiction over non-Indians. 450 U. S. at 564-65.

The State asserts that the right reserved by the Tribe is "a right to hunt and fish free of state law," and not the sovereign power to manage wildlife. Pet. Br. at 20. The two rights are inseparable parts, however, of the sovereign right of access to and control of reservation resources. Wildlife law is basically resource management. *See Hughes v. Oklahoma*, 441 U. S. 322 (1979); *Baldwin v. Fish and Game Comm'n*, 436 U. S. 371 (1978). The State

further asserts that the source of the Tribe's general powers of wildlife management is its status as a landowner. Pet. Br. at 42. The Tribe's power does not spring from its status as landowner, but is an essential instrument of self-government and territorial management. *Merrion*, 455 U. S. at 137.

The State further attempts to limit the Tribe's hunting and fishing rights to "food for basic survival" and "the maintenance of traditional ways." Pet. Br. at 40. The State makes the argument that reservation resources may not be used to provide tribal revenues. *Id.* This startling conclusion is, of course, at odds with the entire history of federal Indian law and the policy of tribal self-determination. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982); *Arizona v. California*, 373 U. S. 546 (1963); *United States v. Shoshone Tribe*, 304 U. S. 111 (1938); *Indian Reorganization Act of 1934*, 48 Stat. 984, 25 U.S. C. Sec. 461 *et. seq.*

This case represents the first time a state has come before this Court and asserted broad civil regulatory jurisdiction over tribal lands, which is not based on a federal statute. This claim violates the general principle that state civil regulatory authority may not be extended to tribal lands in the absence of congressional authorization. *Bryan v. Itasca County*, 426 U. S. 373 (1976). In *Bryan*, this Court stated that the imposition of state regulation on reservations might result "in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than private, voluntary organizations." *Id.* at 388.[6]

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[6] *See also Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1717 (1982) (state gambling laws not applied to reservation under P. L. 280); *United States v. New Mexico*, 590 F. 2d 323 (10th Cir. 1978), *cert. denied*, 444 U. S. 832 (1979) (state licensing of liquor sales on reservation not authorized under 18 U. S. C. Sec. 1161); *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 655 (9th Cir. 1975); *cert. denied*, 429 U. S. 1038 (1977) (county had no jurisdiction to enforce zoning ordinances on reservation under P. L. 280).

This is not a case where the State is attempting to impose a dual system of taxation, which may present no direct conflict. *Colville*, 447 U. S. at 158. The regulatory authority which the State asserts over a reservation resource in this case is inherently incompatible with the federally-sanctioned tribal regulatory scheme already in place. The assertion of state regulatory jurisdiction involves not only the intrusion of state power on reservation lands, but a corresponding diminishment of tribal power. *Bryan v. Itasca County*, 426 U. S. 373, 388 (1976). The concept of inherent tribal sovereignty therefore assumes enhanced importance, as divestiture of such sovereign powers may only be accomplished by federal action.

In view of the above considerations, the Tenth Circuit properly assigned the concept of sovereignty "a leading role on the litigational stage."[7] Contrary to the State's charges, the Tenth Circuit's treatment of tribal sovereignty is neither "startling" nor "novel and enlarged." Pet. Br. at 9. Good sense requires that, as matters of vital tribal concern are involved, tribal sovereignty will be weighed more heavily in the "particularized examination" required by this Court. *White Mountain, supra.* Where the Tribe as sovereign has a substantial interest, state authority is generally preempted by federal law. *White Mountain, supra; Ramah, supra.*

The Tribe, as sovereign, has a duty to regulate and protect wildlife for the common benefit of all its people. Pet. App. at 29a; *Mason v. Sams*, 5 F. 2d 255 (W. D. Wash. 1925) (tribe owns fish and game on reservation). The

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[7]Pet. App. at 16a. The Tenth Circuit did not find preemption by reason of sovereignty alone, as the State implies in its formulation of "Questions Presented", (Pet. Br. at i), nor did the Tenth Circuit treat sovereignty as an "independent, substantive principle of law . . . having preemptive effect", as the State alleges. Pet. Br. at 6. The Tenth Circuit expressly stated that it found it unnecessary to consider whether the Tribe's sovereign powers alone were sufficient to oust state jurisdiction, because of the strong basis for federal preemption. Pet. App. at 21a.

Tribal Council is specifically empowered to protect and preserve the wildlife and natural resources of the Tribe. Pet. App. at 22a-23a. The Tribe has committed its funds, personnel and resources to the establishment of the tribal hunting and fishing enterprise and the creation of a comprehensive wildlife management system, with the encouragement and assistance of the federal government. Non-Indian involvement is a subsidiary issue in this case. The real issue is who is to have control over and derive the profit from a valuable tribal resource created almost entirely by the Tribe and the federal government, where tribal management, the State concedes, has had no adverse impact on state conservation interests.

The Tenth Circuit's treatment of sovereignty is in complete accord with the most recent statements of this Court in *Ramah Navajo School Board v. Bureau of Revenue*, 102 S. Ct. 3394 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980). In both cases, the starting point of this Court's analysis was the right of tribal self-government and broad federal power to regulate tribal affairs under the Indian Commerce Clause. *Ramah*, 102 S. Ct. at 3398; *White Mountain*, 448 U. S. at 142. This Court identified as the *guiding principle* in the preemption analysis the rule that federal law must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Ramah*, 102 S. Ct. at 3403. In *Ramah*, this Court admonished the courts below for their failure to give full deference to this principle. The Tenth Circuit's opinion in this case correctly applied this "guiding principle," which is entitled to even greater weight because the subject of regulation is a reservation resource, and because this case involves a conflict between dual regulatory systems.

This is not a case like *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980), where the Court held that tribal taxation did not oust a state from power to tax on-reservation purchases

of cigarettes by non-members of the Tribe, but noted that "[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 155. Here, the value is almost entirely the result of tribal and federal effort. All of the waters on the Reservation are stocked by the National Fish Hatchery located on the Reservation. The elk herd is a direct result of tribal and federal efforts. Because of tribal range development, the elk herd has flourished and has benefited off-reservation elk hunting. The antelope are nonmigratory and seldom, if ever, leave the Reservation. Only the deer, bear and elk wander on and off the Reservation and the State concedes that tribal conservation efforts have been consistent with good management and have no adverse impact off the Reservation. The implication of the holding in *Colville* is that the Indian Commerce Clause would invalidate state taxes (and here regulation) where value generated on the reservation is at issue. This is in accord with the Court's characterization of the Indian Commerce Clause in *Merrion*, 455 U.S. at 153-54: "To date, . . . this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference. . . ."

The Tenth Circuit opinion in this case is consistent with the opinion of this Court in *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* case presented the question of tribal power to interfere with non-Indians' enjoyment of their own lands, in a context where tribal interest was minimal. This Court expressly stated that the issue in *Montana* was a narrow one; ". . . the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Id.* at 557. In contrast, this case concerns New Mexico's claim to broad regulatory power over "the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache reservation." Pet. App. at 10a.

The State's attempt to characterize the tribal ownership of the land as "insignificant" is untenable and at odds with the established views of this Court, which has consistently guarded the authority of Indian governments over their reservations. *United States v. Mazurie*, 419 U. S. 544, 558 (1975). In *White Mountain*, 448 U. S. 136, this Court stated:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the Reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Id. at 151.

The ownership of the land was the critical factor in *Montana*.[8] The only two sources alleged for preemptive effect were the Crow treaties and 18 U. S. C. Sec. 1165. The treaties were construed by this Court in light of subsequent allotment of the reservation land and held not preemptive. 18 U. S. C. Sec. 1165 was held to apply only to tribal land. Here, the tribal lands of the Mescalero Apache Tribe have never been alienated, so the Treaty retains preemptive force, and 18 U. S. C. Sec. 1165 does, of course, apply to augment the Tribe's regulatory powers. Most significant, however, the *Montana* case contains an affirmation of the Tribe's sovereignty over its own territory and over non-Indian activity based on consensual arrangement or affecting the political integrity, economic security or the health and welfare of the Tribe. 450 U. S. at 565-66.

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[8]The contrast in patterns of land ownership on the Crow Reservation and on the Mescalero Apache Reservation is striking. The Crow Reservation contains only 17 percent land held by the United States in trust for the Tribe, 1 percent owned by the United States, 52 percent owned in fee by Indians, and 28 percent fee land owned by non-Indians. The Mescalero Apache Reservation, on the other hand, is virtually completely tribal trust land. Only a negligible 185 acres is owned in fee.

This case in fact presents the obverse of the question presented in *Montana*. The issue here is whether the State can regulate and prohibit, either directly or through restrictive regulations, hunting and fishing on *tribal* land. In *Montana*, this Court construed this issue of the ownership of the land as "a substantial part of their claim" and affirmed the power of the Tribe to control non-Indian hunting and fishing on its own lands. *Id.* at 550, 557. The same logic which dictates exclusive state jurisdiction over non-Indian lands dictates exclusive tribal jurisdiction over tribal lands.

In *Montana*, the Tribe's interest focused on sport hunting and fishing on a navigable river, owned and stocked by the State. There was no evidence of substantial tribal or federal development and management of fish and game, and no evidence that hunting and fishing contributed substantially to the economy of the Tribe. The Tribe had accommodated itself to the nearly exclusive state jurisdiction over the land involved.

In contrast, the Mescalero Apache Tribe operates a reservation-wide hunting and fishing program, including fishing and big game hunting of elk, deer, bear, and antelope. The Mescalero Apache Tribe has an extensive program of game and fish management, carried on with extensive federal assistance, including federal approval of all tribal ordinances. The reservation wildlife resource is a creation of the Tribe and the federal government. Hunting and fishing are important sources of income to the Tribe, both directly and indirectly as a stimulant to the tourism program. The revenues are used for governmental purposes and tribal economic development. Tribal management has been exemplary and there have been no harmful effects off the Reservation. State officers have not entered the Reservation to enforce state law since 1969.

The State of New Mexico performs no services justifying any interference with the Tribe's program. There is no legitimate reason for the State to be allowed to impose its license fee or substantive regulations. What this

Court said in *White Mountain*, 448 U.S. 136, is equally applicable here:

> Respondents (state officials) have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities . . . within the Reservation. . . . They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations. . . .

Id. at 148-49, 150. *See also, Ramah*, 102 S. Ct. 3394:

> Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has "left the State with no duties or responsibilities."

Id. at 3401.

The State makes an attempt to justify its regulation by its general research into fish and wildlife programs. Pet. Br. at 47. Such general activities, even if arguably beneficial to the Tribe, cannot expand the State's jurisdiction on the Mescalero Apache Reservation any more than it could justify an intrusion in a neighboring state. The State interest in state-wide air and water quality standards is likewise insufficient. As stated by the Tenth Circuit, the interests asserted by the State are also held by the Tribe as sovereign. Pet. App. at 29a. The State has no monopoly on environmental concerns.

The State claims that it contributes to the hunting and fishing program through provision of access roads and fire suppression services throughout the State. In *Ramah*, this Court specifically rejected a similar claim, holding that provision of off-reservation services is not a sufficient interest to justify the intrusive effect of state jurisdiction. *Ramah*, 102 S. Ct. at 3402 n. 9.

The State concedes that the tribal program maintains the fish and wildlife populations within the Reservation at levels consistent with good management and that there is

no adverse impact on fish and wildlife outside the Reservation. Res. App. at 35a. The only possible off-reservation effects are the benefits of increased hunting and fishing opportunities. The State can point to no interest in conservation which sustains its intrusive attempt to regulate a vital natural resource on an Indian reservation. Viewed in light of the interest-balancing analysis established by this Court, state jurisdiction has been preempted by federal law.

2. The Treaty, Federal Statutes, Federal Participation And Federal Policy Favoring Tribal Self-Determination Preempt The Application Of State Law.

There is no requirement of express preemptive intent to find that state authority over reservation affairs has been preempted. *White Mountain*, 448 U.S. 136 (1980). Rather, the task is to determine, after the particularized inquiry carried out above, "whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. The Tenth Circuit found six sources of federal preemption, which, when read with due consideration for tribal sovereignty, compel the conclusion that state authority is foreclosed: (a) the Tribe's Treaty of July, 1852, 10 Stat. 979; (b) the New Mexico Enabling Act, 36 Stat. 557 (1910); (c) the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 476 (IRA); (d) the Tribe's Constitution and ordinances enacted pursuant to the IRA; (e) the extensive federal development assistance; and (f) the negative inferences from P.L. 280, 67 Stat. 590. Pet. App. at 21a.

To these can be added the general federal statutes mentioned in *White Mountain*, which express a "firm federal policy of promoting tribal self-sufficiency and economic development." 448 U.S. at 143 n.10. Although not treated as an independent source of preemption by the Tenth Circuit, 18 U.S.C. Sec. 1165 is also a part of the preemptive federal scheme. This statute indicates federal intent to enforce tribal authority over hunting and

fishing on tribal lands. Finally, of course, underlying all of these is the Indian Commerce Clause which is the main source of the federal government's plenary authority over Indian affairs and which may, in itself, have a "role to play in preventing undue discrimination against, or burdens on Indian commerce." *Colville*, 447 U. S. at 157.

a. *The Treaty of July 1, 1852, 10 Stat. 979.* Article One of the Tribe's Treaty with the United States provides as follows:

> Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and *exclusively* under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit [*emphasis added*].

Article Nine of the same Treaty provides:

> . . . that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

The present boundaries were established by Executive Order in 1883.[9] The rights at issue here are not dependent on whether the Reservation was created by Executive Order or by treaty. *Merrion v. Jicarilla Apache Tribe*, 450 U. S. 130, 133 n. 1 (1982); Pet. App. at 17a.

A tribe reserves its right to control hunting and fishing in the area in which it resides whether or not such right is specifically mentioned in a treaty. *Menominee Tribe v. United States*, 391 U. S. 404 (1968); *United States v. Winans*, 198 U. S. 371 (1905). Indian treaties are to be

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[9]Since creation of the Tribe's Reservation was mandated by treaty, the Reservation is more than a traditional executive order reservation. *United States v. Santa Fe Pacific Railway Co.*, 314 U. S. 339, 346 at n. 4 (1940); Memo Sol. I. D. 961 (June 28, 1940) (Executive Orders merely fulfilled obligations toward the Mescalero Apache undertaken by the United States in the Treaty of July 1, 1852).

liberally construed in favor of the Indians. *Choctaw Nation v. United States*, 318 U. S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U. S. 665, 675 (1912). The Mescalero Treaty itself provides in Article 11 that "this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians."

The Mescalero Apache Reservation contains no allotments, and, except for a few acres, is entirely held in trust by the United States for the Mescalero Apache Tribe. This Court has stated that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U. S. at 561. This Court stated that "what is relevant . . . is the effect of the land alienation occasioned by that policy [allotment] on Indian treaty rights tied to Indian use and occupation of reservation land." 450 U. S. at 560 n. 9. Since the Mescalero Reservation was never subjected to the policy of allotment, its treaty rights have not been affected and it remains "exclusively under the laws, jurisdiction and government of the United States of America".[10]

b. *New Mexico Enabling Act, 36 Stat. 557.* Like most states other than the original thirteen colonies, New Mexico was permitted to join the Union by a federal statute that specified the terms of admission. The Federal Enabling Act for New Mexico, 36 Stat. 557 (1910), requires that the people of New Mexico:

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[10]The decision in *Mescalero Apache Tribe v. O'Cheskey*, 625 F. 2d 967 (10th Cir. 1980), *cert. denied*, 450 U. S. 959 (1981), has been invalidated by the decision in *Ramah, supra. O'Cheskey*, however, involved only a tax on a non-Indian contractor. In this case the State asks that it be allowed to physically enter the Reservation and impose a comprehensive regulatory scheme on an important reservation resource. The exclusivity of federal jurisdiction under the Treaty will not allow such intrusive state action.

(a) "forever disclaim all right and title" to all lands "owned or held by any Indian or Indian tribes . . . .", and

(b) agree and declare that "until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

36 Stat. 557, Sec. 2.

The plain meaning of the disclaimers is controlling in the absence of exceptional circumstances. *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1537 (1982). This Court has previously declined to give those disclaimers "an especially crabbed or restrictive meaning." *McClanahan v. Arizona Tax Comm'n*, 411 U. S. 164, 176 (1973). Congress required this disclaimer of jurisdiction over Indian lands in order to discharge this nation's solemn, pre-existing treaty obligations to the Indians.

The requirement of disclaimers is consistent with the long-standing federal policy of protection of Indian tribes through exclusive federal jurisdiction. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U. S. 786, 789 (1945). The disclaimers have been consistently found effective in cases involving areas of significant tribal concern.[11] In *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164 (1973), this Court relied on the disclaimer as evidence that the State lacked jurisdiction to impose its personal income tax on the Reservation. *See also Fisher v. District Court*, 424 U. S. 382, 386 n. 8 (1976); *Williams v. Lee*, 358 U. S. 217, 220-23 (1959); *Williams v.*

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[11] *Organized Village of Kake v. Egan*, 369 U. S. 60, 68 (1962), cited by Petitioners, has no application to the question whether the state may exercise authority in areas set aside by treaty for the exclusive use and control of Indians. *McClanahan v. Arizona Tax Comm'n*, 411 U. S. 164, 176 n. 15 (1973); *Chino v. Chino*, 90 N. M. 204, 561 P. 2d 476 (1977).

United States, 327 U.S. 711, 714 (1946).[12] Particularly where management of an important tribal resource is at issue, the exclusivity language of the Mescalero Treaty and the Enabling Act disclaimer are sufficient to preempt state regulation.

New Mexico's attempt to license and regulate hunting and fishing on the Mescalero Reservation is without jurisdictional basis, just as was its effort to impose its gross receipts tax on the non-Indian contractor in *Ramah*. The New Mexico gross receipts tax is a tax on the privilege of doing business in New Mexico. This Court noted that "New Mexico has not explained the source of its power to levy such a tax in this case where the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government". 102 S.Ct. at 3402. Here only the Tribe can grant the privilege of hunting or fishing on its Reservation, just as only the Navajo Tribe could grant the "privilege of doing business" on the Navajo Reservation. Only the Tribe, therefore, has power to license and regulate such hunting and fishing.

c. *The Indian Reorganization Act of 1934.* In *White Mountain*, this Court characterized the purpose of the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 461 as

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[12]As noted by the State, questions regarding the scope and meaning of state disclaimers are now pending before this Court. *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3217 (October 18, 1982); San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3217 (Oct. 8, 1982). The pending cases involve, *inter alia*, a claim by the states involved that the disclaimers apply only to "proprietary" or ownership interests, and not to "governmental" or regulatory interests. The structure of the disclaimer requirement indicates the fallacy of this view. The states were required to *both* agree to the "absolute jurisdiction and control" of Congress, and, separately, to disclaim all right and title to Indian lands. The States' claim is also inconsistent with the treatment of the Enabling Acts by this Court and by Congress. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); Public Law 280, Sec. 6, 67 Stat. 588 (removing legal impediment to assumption of state jurisdiction).

being "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." 448 U.S. at 143 n. 10, *citing Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Pursuant to this Act, the Mescalero Apache Tribe adopted a federally-approved Constitution in 1936, and adopted a federally-approved Revised Constitution in 1965 (Jt. App. at 43a). The Constitution specifically recognizes the Tribal Council's authority to "protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation . . . ." (Jt. App. at 53a). Tribal hunting and fishing ordinances adopted pursuant to the Tribe's federally-approved Constitution implement the overriding federal policy expressed in the IRA.

d. *Tribal Ordinances.* The federally-approved hunting and fishing ordinances passed pursuant to the Tribe's Constitution are of two kinds. One is a permanent ordinance providing that no state license is required for any person hunting or fishing on the Reservation, requiring tribal licenses for all non-members and requiring conformance with Tribal Council regulations (Jt. App. at 74a). The other is an annual tribal ordinance which deals in great detail with every aspect of hunting or fishing on the Reservation (Jt. App. at 76a-91a).[13] These extensive regulations equal or surpass in comprehensiveness those

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[13]The tribal ordinances control the following: (1) the hours for hunting and fishing; (2) the types of ammunitition to be used on each type of big game, including caliber and bullet weight; (3) legal hunting areas within the Reservation; (4) whether dogs are allowed in a particular hunt; (5) whether guides are required; (6) where hunters and anglers are to check in and out; (7) sex and age of game to be hunted; (8) number of permits to be issued; (9) non-use of artificial light; (10) permit fees; (11) number of lines allowed per person; (12) use of boats and other flotation equipment; (13) littering and pollution; (14) regulation of campfires; (15) use of snags, nets, seines and other devices; and (16) civil penalties and forfeitures (Jt. App. at 76a-91a).

regulations involved in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *White Mountain, supra;* or *Ramah, supra.*

Two cases decided by this Court have dealt with the issue of the preemptive effect of federally-approved tribal ordinances. In *Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980), this Court rejected a preemption argument based on adoption by a Tribe of a federally-approved cigarette taxing ordinance. That case, however, involved an attempt by the Tribe to market a tax exemption, which in no way represented value generated on the Reservation.

A different result was reached where important tribal interests were at stake. In *Fisher v. District Court*, 424 U.S. 382 (1976), a state court asserted jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe. A tribal ordinance granted exclusive jurisdiction over such adoptions to the Tribal Court. In a *per curiam* opinion, this Court reversed, holding that the tribal ordinance did preempt the state jurisdiction and stating:

> The tribal ordinance conferring jurisdiction on The Tribal Court was authorized by Sec. 16 of the Indian Reorganization Act, 25 U.S.C. Sec. 476 [25 U.S.C.S. Sec. 476]. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe . . . that jurisdiction has now been preempted.

Id. at 390.

Fisher v. District Court, holds that when tribal ordinances go to the essence of tribal self-government, those ordinances carry preemptive power because they are necessary to implement the federal policy of revitalizing tribal government, expressed in the IRA and other federal statutes. This is a case chiefly concerned not with jurisdiction

over non-Indians, but with authority over management of tribal resources. This authority is crucial to tribal self-government. Therefore, the Mescalero Apache Tribe's ordinances directly implement the "overriding policy" of the Indian Reorganization Act and have preemptive effect. *See also United States v. Mazurie*, 419 U.S. 544 (1975).

e. *Federal Developmental Assistance.* Federal participation in the Tribe's hunting and fishing program is comprehensive. Federal efforts were largely responsible for the importation of 162 elk from Yellowstone National Park in order to build the Tribe's herd on the Reservation. A federal conservationist works on the Reservation full-time along with tribal conservation officers to ensure that seasons and bag limits are compatible with good conservation practices. Fishing on the Reservation is also a tribal-federal undertaking. The Reservation has no natural lakes, but has several man-made lakes, all constructed with federal funds. All reservation waters are stocked exclusively with fish from the National Fish Hatchery, located on reservation land leased to the Bureau of Sport Fisheries and Wildlife of the Department of the Interior. The hatchery is currently federally funded and operated pursuant to an agreement between the Tribe and the Bureau of Sport Fisheries and Wildlife. The agreement provides for federal technical assistance in the management and development of fishery resources in reservation waters. A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation, based upon periodic surveys of all Mescalero Apache Reservation fishing waters.

This pervasive federal involvement signifies two things. First, it demonstrates that state interest in the Tribe's hunting and fishing program is minimal or nonexistent. Second, the pervasive federal involvement is itself expressive of both a recognition of a lack of state authority and an intent by the federal government, in cooperation with the Tribe, to totally preempt the field. This

pervasive federal involvement has itself been viewed as sufficient to preempt state authority. In *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F. 2d 75 (4th Cir. 1978), *cert. dismissed*, 446 U. S. 960 (1980), the federal government had subsidized the Tribe's sport fishing program for over a decade by stocking the waters on the Reservation, and by supplying personnel to assist in the program. The Court concluded that "the strong federal policy supporting the Band's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's reservation." *Id.* at 78.

f. *Public Law 280, As Amended.* Under Public Law 280, New Mexico could have assumed a degree of civil and criminal jurisdiction over the Mescalero Apache Reservation. New Mexico did not avail itself of that opportunity. The statute has since been amended to require tribal consent through an election process which must be strictly followed. *See* 25 U. S. C. Sec. 1321 and *Kennerly v. District Court of Montana*, 400 U. S. 423 (1971). This amendment itself is an expression of congressional intent to insulate tribes and their reservations from state control except where the Tribe desires state involvement. Even if the correct procedure is followed to obtain jurisdiction, the statute specifically protects the tribes from the deprivation of "any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulating thereof." 25 U. S. C. Sec. 1321(b). The passage by Congress of a statute preserving an immunity has previously been taken by this Court as evidence of existence of the immunity. *See, e.g., McClanahan v. Arizona Tax Commission*, 411 U. S. 164 (1973) and the analysis of the Buck Act, 4 U. S. C. Sec. 105, *et seq.*

g. *18 U. S. C. Sec. 1165.* While not finding particular premptive effect in 18 U. S. C. Sec. 1165, the Tenth Circuit did nevertheless find it relevant. It is deserving of

more weight in the scale than it was accorded. It represents recognition by Congress of tribal authority to set terms and conditions for hunting and fishing on the Reservation and to provide a federal sanction for violation of those conditions. The statute provides for a criminal fine to be imposed on anyone hunting, fishing or trapping on tribal trust land without tribal permission. This Court has construed the statute as establishing tribal jurisdiction over hunting and fishing on tribal land. *Montana v. United States,* 450 U.S. at 561-62. The legislative history indicates that 18 U.S.C. Sec. 1165 was enacted to "fill a gap in the present law for the protection of [Indian] property. *Id.* at 562 n. 12, *citing* S. Rep. No. 1686, 86th Cong., 2d Sess. (1960). This indicates that Congress assumed that the States had no jurisdiction over hunting and fishing on tribal lands.

h. *Federal Policy.* This Court has recently identified the "guiding principle" in the preemption analysis: federal law must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Ramah,* 102 S.Ct. at 3403 (quoting *White Mountain,* 448 U.S. at 144). There is a firm federal policy of encouraging tribes to revitalize their self government and to assume control over their business and economic affairs. *White Mountain,* 448 U.S. 136, 149 (1980); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 151 (1973). This policy has found expression in a number of general federal statutes and implementing regulations. See *White Mountain,* 448 U.S. at 143, n. 10. The hunting and fishing ordinances of the Mescalero Apache Tribe are federally approved pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 461 *et seq.,* whose purpose was to foster and encourage tribal self-government. In the Indian Financing Act of 1974, 25 U.S.C. Sec. 1451 *et seq.,* Congress states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will

> *fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts* comparable to that enjoyed by non-Indians in neighboring communities.

[*Emphasis added*].[14]

The most recent expression of federal policy is the Statement by the President dated January 24, 1983, released from the White House Office of the Press Secretary, 19 Weekly Compilation of Presidential Document, and attached hereto as an appendix. The President reaffirmed the course of current federal policy:

> This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

In his Statement, the President emphasized the "government to government" relationship of the United States with Indian tribes and reaffirmed the federal commitment to foster and encourage tribal self government through continuation of the federal trust responsibility. The President listed as a major tribal government function "developing and managing tribal resources." Listing natural resources such as timber, fishing and energy as avenues of development for tribes, the President stated that "[t]ribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources." This expression of federal intent is consistent with the policy underlying federal legislation for the past several decades.

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[14] *See also*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. Sec. 450, *et seq.*, which expresses similar policies, and the congressional finding in the Indian Child Welfare Act, 25 U. S. C. Sec. 1901, *et seq.* "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources. . . . "

The imposition of state regulation would render much of the tribal scheme a nullity. The State would hold within its power the ability to eliminate or greatly reduce hunting and fishing on the Reservation if it set seasons which did not overlap at all or which overlap only to a small extent. These decisions could be made for purely arbitrary reasons or because of disagreement with the Tribe over what constitutes good conservation. Some state regulations are completely unrelated to any conservation goal (Jt. App. at 206a). The State must prove that a measure is necessary for conservation before it can interfere with off-reservation Indian fishing rights. *Washington Department of Game v. Puyallup Tribe,* 441 U. S. 44 (1973). Certainly the burden should not be reversed where on-reservation resources are involved.

The State is attempting to regulate a resource which would not exist but for federal and tribal efforts. The Tribe's efforts would do nothing more than subsidize the State. The State's imposition of an additional licensing fee limits the Tribe's ability to raise the cost of its own licenses (Pet. App. at 14a). This obstructs the federal objective of guaranteeing Indians that they will receive the benefits of reservation resources. *White Mountain,* 448 U. S. at 149. A decision in favor of the State here would send an unmistakable message to Indian tribes: Do not bother with self-determination because the states will stand by ready to reap the benefit of your productive labor and reservation resources. In accordance with federal policy, the responsibilities and benefits from the reservation wildlife resource should be reserved for the Tribe.

II. State Regulation Of Wildlife Resources Within The Mescalero Apache Reservation Is An Impermissible Interference With Tribal Self-Government.

A. The Tribe And The Federal Government Have Exclusive Jurisdiction Over The Regulation Of Wildlife Resources On The Reservation.

The State of New Mexico has presented to this Court a claim to regulate the management and harvesting of wild-

life resources on Indian land. The State's claim to regulatory authority is not based on any federal statute, as in other cases presented to this Court. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Rehner v. Rice*, 678 F. 2d 1340 (9th Cir. 1982), *cert. granted, Rice v. Rehner*, — U.S. — (No. 82-401, October Term, 1982). Instead, the State asserts regulatory authority over resources on an Indian reservation based solely upon its police powers and a theory of "trusteeship." Pet. Br. at 22. This case represents the first instance of such a general claim to state regulatory power over Indian land to come before this Court since 1832. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In such a case, the burden is on the State to show a basis for such jurisdiction. Although ample grounds exist for a finding of preemption by federal law (see Part I, *supra*), that analysis is not necessary in this case. This case is controlled by the principles of *Worcester v. Georgia*, and its constitutional foundations. The most basic principle of Indian law, which has survived for more than one hundred fifty years, is the principle that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1977), quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1945). In *Worcester*, the State of Georgia had imprisoned a white man living among the Cherokees with the consent of the tribal authorities. This Court held that the imprisonment was a violation of the Constitution, and that Indian tribes were subjects of federal law, to the exclusion of state law, entitled to exercise their own inherent rights of sovereignty unless inconsistent with federal law.

This principle has been modified in cases where the Indian tribe has no interest in the subject of the jurisdiction, or only a contrived interest. *United States v. McBratney*, 104 U.S. 621 (1882); *Washington v. Confeder-*

ated Tribes, 447 U. S. 134 (1980). The principles may also be inapplicable in regard to regulation of activities on non-Indian land. *Montana v. United States,* 450 U. S. 544 (1981). *But see Settler v. Lameer,* 507 F. 2d 231 (9th Cir. 1974) (tribe has inherent power to regulate off-reservation fishing). The principle excepts those cases in which the exercise of power by Indian tribes is inconsistent with their status of dependency on the federal government and their acceptance of its protection. *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191 (1978).

The principle remains, however, in its essential form: "[until] Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler,* 435 U. S. 313, 323 (1978). Fundamental attributes of inherent sovereignty remain unless expressly divested by federal law or inconsistent with an overriding interest of the federal government. *Washington v. Confederated Tribes,* 447 U. S. 134, 153 (1980). Even where a State's interests are implicated, inherent sovereignty remains in the absence of federal divestiture. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.* at 154.

This case involves regulation of fish and game resources on tribal land. The ancient and immemorial right of Indian tribes to access and control of hunting and fishing on their lands has been universally recognized. *See* Part I-A, *supra.*[15]

This case represents the latest in the continual succession of state attempts to undermine and artifically limit the core of the inherent sovereignty doctrine. The acknowledgement of this doctrine has not been a matter of lip

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[15]Whether wildlife is tribal "property" in a strict legal sense is not at issue. The State concedes that it does not "own" the wildlife within its borders. Pet. Br. at 22. The State reaches the remarkable conclusion, however, that while wildlife within its borders is a state "resource", *Id.* at 22, wildlife within the Reservation is not a tribal resource. *Id.* at 38. This conclusion is absurd on its face. Like the states, the Tribe has a "special interest in regulating and preserving wildlife for the benefit of [its] people." *Id.* at 22.

service to an outmoded theory, but has been administered by the federal courts with a spirit of sympathy and respect proper to the laws of a sovereign state. F. Cohen, *Handbook of Federal Indian Law*, 125 (1945); *United States v. Wheeler*, 435 U.S. 313 (1978).

This Court recently rejected an argument which limited tribal sovereignty to the powers of a landowner, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Upholding the tribal power to impose a tax on lands under lease to non-Indians, this Court held that the power to tax did not derive solely from the power to exclude non-Indians from tribal lands, but was an "essential instrument of self-government and territorial management." *Id.* at 139, 141. The Court reaffirmed that Indian tribes are "domestic, dependent nations" entitled to the tools for raising revenue necessary to cover the cost of government. *Id.* at 141. In *Merrion*, this Court preserved the broad tradition of sovereignty which was established in *Worcester v. Georgia*, *supra*, stating that the power to tax "derives from the tribe's general authority, as sovereign to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137.

The Tribe's power to regulate wildlife resources on its reservation is an essential attribute of its general authority as sovereign. The interest regulated is clearly a value generated on the Reservation. The hunter or angler avails himself of the privilege of hunting or fishing on the Reservation and is the recipient of extensive tribal services in the form of tribal conservation activities, wildlife management services, tribal guides, and ancillary recreational benefits. Clearly, the Tribe's sovereign authority enables it to act to protect the health, safety and welfare of its members. The Tribe has both an economic interest in the regulation and a general governmental interest in regulation for the conservation of tribal resources. The Tenth

Circuit reached the only possible conclusion on this issue: "In regulating game on the Reservation, the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a 'significant interest'." Pet. App. at 19a. Because of the direct effect of non-member hunting and fishing on the reservation resources, the Tribe's interest in regulating the activity cannot be seriously questioned.

Where the Tribe, as sovereign, has a significant interest which is not subject to an overriding federal interest, and the activity occurs on tribal lands, its sovereign authority is exclusive. This is the core of the sovereignty doctrine which this Court has preserved since *Worcester v. Georgia,* 31 U. S. (6th Pet.) 515 (1832). Indeed, the factual situation is very close to that of *Worcester.* Both cases involve non-Indian activity sanctioned by the Tribe. In both cases a state asserts the right to limit or control the non-Indian activity on tribal land. In neither case had the federal government acted to divest tribal autonomy nor to grant state jurisdiction. In such a situation the Tribe's authority is exclusive.

It is clear that the State of New Mexico is attempting to regulate in an area of significant tribal concern on tribal lands. Vital tribal resources such as fish and game should receive at least the same protection as Indian personal property or income earned on the Reservation. Although such state intrusions are also prohibited under the preemption analysis (See Part I, *supra*), the interference with tribal self-government forms an independent barrier. *White Mountain, supra.* This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate such an immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n v. United States,* 319 U. S. 598, 613-14 (1943).

B. Dual Regulation Of Reservation Wildlife Resources Presents An Inherent Conflict Which Is An Impermissible Interference With Tribal Self-Government.

Tribal resources must be protected from state regulatory authority, or tribes may be reduced to no more than private, voluntary organizations. *United States v. Mazurie*, 419 U.S. 544 (1975). It is not sufficient that the tribes retain the right to enact more restrictive rules than the states under systems of concurrent jurisdiction. Any private landowner could do as much. If the doctrine of inherent sovereignty is to retain any meaning, tribes must be affirmed in their rights to control the exploitation and management of tribal resources. The exercise of state authority is necessarily infringement upon the sovereign authority of the tribe.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the State of Minnesota asserted general regulatory authority over a reservation and cited Public Law 280 as the source of its authority. This Court found that Public Law 280 was not a grant of regulatory authority over Indian lands. This Court found it unnecessary to engage in a preemption or infringement analysis, since no federal law delegated regulatory jurisdiction to the state. This Court further noted the danger that imposition of state regulatory schemes on Indian reservations might undermine or destroy existing tribal governments. *Id.* at 388.[16]

The interference with tribal self-government that would result from allowing the State concurrent jurisdiction to regulate the Tribe's resources would clearly violate the standard established in *Williams v. Lee*, 358 U.S. 217

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[16]On the devasting impact on tribal governments of state regulatory control, see *Santa Rose Band of Indians v. Kings County*, 532 F. 2d 655, 662-63, 666-68 (9th Cir. 1975); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. Rev. 535 (1975); *Note, The Extension of County Jurisdiction Over Indian Reservations In California: Public Law 280 and the Ninth Circuit*, 25 Hastings L.J. 1451 (1974); Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 California L. Rev. 1261 (1971).

(1959), in which this Court held that tribal courts had exclusive jurisdiction over a civil action brought by a non-Indian against an Indian to recover on a debt incurred on a Reservation. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. This Court held that state jurisdiction would "undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. Certainly, regulation of reservation wildlife resources is also a part of "reservation affairs." The involvement of a non-Indian does not change the result: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.*

This Court has held that the infringement test, like the preemption analysis, requires "an accommodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 156 (1980). This Court identified the relevant considerations in *Colville*:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U. S. at 156-57.

The Tenth Circuit applied the *Colville* balancing process to this case and found that the scales "tipped decisively" in the Tribe's favor. Pet. App. at 25a. The court found that:

> Unlike *Colville*, we here have a clear state interference with a traditional tribal regulatory power. To restrict the application of the tribal scheme to members only would be to complicate excessively the enforcement process and to render the very idea of "regulation" an absurdity. Here the Tribe has, with the aid of the federal government, generated the "value . . . on the reservation" which it now seeks to control and whose benefits it seeks to enjoy. The state services received by on-reservation sportsmen are minimal —incidental spillover effects of state activities outside the reservation. In fact, the spillover benefits to the State from the tribal conservation scheme, *e.g.*, development of the migratory elk herd—may well be more significant. Although New Mexico has a legitimate interest in the conservation of its wildlife, the Tribe's activities do not threaten that interest in any way.

Pet. App. at 26a-27a.

The economic importance to the Tribe of its hunting and fishing program is also a significant factor in finding infringement upon tribal self-government (*Id.* at 27a), as is interference with the overall federal policy of Indian self-determination. *Id.* As stated by the Tenth Circuit in this case:

> If we were to permit state interference with the tribal scheme, we would be effectively "deny[ing] Indians the opportunity of developing their own system." *Chino v. Chino*, 90 N. M. 204, 561 P. 2d 476, 479 (1977). The federally declared policy of self-determination becomes a mockery if it is subject to defeasance by the State.

Pet. App. at 28a.

The tribal ordinances and regulations are subject to Secretarial approval to insure that the tribal authority is properly exercised under the Indian Reorganization Act, 25 U. S. C. Sec. 476. In *Merrion*, this Court found that such a system of federal check points established an administrative process to monitor the exercise of tribal authority. The tribal regulatory scheme is therefore safeguarded by federal review. 450 U. S. at 141.

This Court has indicated that dual regulatory schemes create mutual dislocations. *Washington v. Confederated Tribes*, 447 U. S. 134 (1980); Pet. App. at 20a. Although infringement is established by the very attempt to impose a dual regulatory system on reservation resources, the actual conflicts between the State and Tribe are substantial. A non-Indian hunter wishing to hunt elk or antelope on the Reservation for two consecutive years would be unable to do so if a state license were required. The Tribe allows hunting of does in order to prevent overpopulation on the Reservation, while the State does not. Furthermore, seasons seldom coincide, and limits on fish taken are also inconsistent. If tribal and state seasons did not overlap at all, the tribal season would be eliminated if state law were held to apply. Such a situation is very possible given the short season for some big game, such as antelope. The possibilities for conflict are virtually infinite, including licensing policy, bag limits, seasons, use of firearms and the time of day hunting is allowed.

Furthermore, the State cannot perform comprehensive wildlife management services on the Reservation. The State concedes that it has no authority to regulate hunting and fishing by tribal members on the Reservation. Only the Tribe has the inherent authority to comprehensively regulate the activity of all hunters and anglers. Only the Tribe may make the decisions and take the action necessary to maintain acceptable levels of fish and wildlife on the Reservation, such as limiting all hunting or fishing, stocking of streams or lakes on the Reservation, and stocking of game. Only the Tribe can conduct comprehensive research and census of hunting and fishing on the Reservation. And, finally, only the Tribe can make the decisions regarding habitat acquisition and improvement.

C. Tribal Regulation Of Reservation Wildlife Resources Can Be Adequately Enforced By Existing Means.

The State has argued that it must have concurrent jurisdiction over hunting and fishing on the Reservation

in order to ensure adequate enforcement, in light of this Court's holding that Indian tribes have no inherent criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Tribe,* 435 U. S. 191 (1978). Enforcement is not a problem. The Tribe has civil penalties available to it just as does the State. This enforcement is augmented by federal enforcement under 18 U. S. C. Sec. 1165 and by tribal power to exclude non-members from the Reservation.

In addition, comprehensive new federal enforcement provisions are now available, pursuant to the Lacey Act Amendments of 1981, codified at 16 U. S. C. Sec. 3371 *et seq.* This new law, passed in November of 1981, makes it a federal offense, among other things, to "import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any *Indian tribal law.*" 16 U. S. C. Sec. 3772(a)(1) (*emphasis added*). The Act provides for substantial civil and criminal penalties for violation of tribal law and authorizes forfeiture of fish or wildlife as well as vehicles or equipment used in the violation. 16 U. S. C. 3373, 3374. The Act also authorizes the Secretary to enter into agreements with Indian tribes to carry out the purposes of the Act, whereby tribal agencies and tribal personnel can make arrests, serve process, and otherwise enforce the provisions of the law. 16 U. S. C. Sec. 3375(a), (b). While 16 U. S. C. Sec. 3378(c) (3) provides that the Act of its own force is not intended to enlarge or diminish the authority "of any State or Indian tribe to regulate the activities of persons within Indian reservations or to alter existing tribal or state jurisdiction over resources within Indian reservations," nevertheless, it does set to rest any arguable concerns about the adequacy of enforcement of tribal fish and game laws on Indian reservations.

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CONCLUSION

For all the reasons set forth above, the Respondent respectfully submits that the decision of the Court of Appeals should be affirmed.

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APPENDIX

THE WHITE HOUSE

OFFICE OF THE PRESS SECRETARY

For Immediate Release January 24, 1983

STATEMENT BY THE PRESIDENT

INDIAN POLICY

This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and

large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be charted by the tribes, not the federal government.

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Tribal Self-Government

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is

through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions—enforcing tribal laws, developing and managing tribal resources, providing health and social services, educating children—are frequently still carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacities, this Administration has developed, through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other blocks to the states

consolidated dozens of categorical federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive federal regulation, and provide for more local control. This Administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with state and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this Administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U. S. C. 4273) to include a representative of Indian tribal governments. In the interim before Congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian Tribal Governmental Tax Status Act which provides tribal governments with essentially the same treatment under federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Edu-

cation Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first steps in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing reservation economies.

Development of Reservation Economies

The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective. As a result, involvement of private industry has been limited, with only infrequent success. Developing reservation economies offers a special challenge: devising investment procedures consistent with the trust status; removing legal barriers which restrict the type of contracts tribes can enter into and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services. They also often lack the regulatory, adjudicatory and enforcement mechanisms necessary to interact with the private sector for reservation economic development. Development on the reservation offers potential for tribes and individual entrepreneurs in manufacturing, agribusiness and modern technology, as well as fishing, livestock, arts and crafts and other traditional livelihoods.

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of a

financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This Administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all levels; examine and recommend changes in federal law, regulations and procedures to remove such obstacles; identify actions state, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with

the responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the federal role be fully reviewed and coordinated. Therefore, this Administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that federal activities are non-duplicative, cost effective, and consistent with the goal of encouraging self-government with a minimum of federal interference.

Summary

This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

This Administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialogue with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

This nation's economic health—and that of the tribes—depends on adopting this Administration's full Economic Recovery Program. This program calls for eliminating excessive federal spending and taxes, removing burdensome regulations, and establishing a sound monetary pol-

icy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.

[Attachment omitted.]

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